



# CHINA'S RATIFICATION OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: THE IMPLICATIONS FOR HONG KONG

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*The Convention on the Rights of Persons with Disabilities (CRPD) was drafted with unprecedented input from civil society and entered into force on 3 May 2008, one month after obtaining its twentieth ratification. Although China was only a signatory at the time, it filed its instrument of ratification on 1 August 2008, in time to participate in the first meeting of States Parties in October 2008 and to nominate a member for the first Committee on the Rights of Persons with Disabilities. Pursuant to Article 153 of the Basic Law of the Hong Kong Special Administrative Region, the Central government also commenced negotiations with the local Hong Kong government and ultimately decided to apply the CRPD to Hong Kong, albeit with a questionable declaration that purports to limit the application of the treaty in the field of immigration. The CRPD is an unusually long and detailed treaty and Hong Kong now has an obligation to conduct a comprehensive review of its laws and policies. The author argues that the Disability Discrimination Ordinance and its enforcement model should be amended and that the government should create a central body on disability to review and coordinate executive policies that are necessarily affected by the treaty, particularly those relating to accessibility, inclusive education, and mental health.*

## **I. Introduction to the Convention on the Rights of Persons with Disabilities**

The Convention on the Rights of Persons with Disabilities (CRPD)<sup>1</sup> is the first new human rights treaty of the 21st century. It is not the first international

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<sup>1</sup> The CRPD and the Optional Protocol to the CRPD (containing an individual complaints procedure and an inquiry procedure) can be viewed on the website of the recently established United Nations Committee on the Rights of Persons with Disabilities, the body of independent experts that will monitor implementation of the treaty. Available at: <http://www2.ohchr.org/english/bodies/crpd/index.htm> (accessed 15 Nov 2008).

instrument to address disability. The United Nations Standard Rules on the Equalization of Opportunities for Persons With Disabilities was adopted by the United Nations in 1993 but they are not legally binding.<sup>2</sup> Other human rights treaties – including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) – can and should be applied. However, they do not address disability in a comprehensive manner and their monitoring bodies often neglect to discuss issues of particular relevance to persons with disabilities.<sup>3</sup>

It is hoped that a thematic treaty on disability will bridge this gap and bring disability issues into the mainstream of international human rights law and discourse.<sup>4</sup> The CRPD has been described as “historic and path breaking” and as a “paradigm shift” in human rights law.<sup>5</sup> This is partly because the treaty marks a high point in the movement away from the medical social-welfare approach to disability and toward the social and human rights models of disability.<sup>6</sup> The CRPD addresses people with disabilities as subjects with rights, rather than objects of charity, and focuses on capability, inclusion, and the removal of the physical and attitudinal barriers that prevent people from fully participating in their communities. It has also been argued that the CRPD will affect how we conceive of human rights

<sup>2</sup> See the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 20 December 1993, 48th session, resolution 48/96, annex. Available on the website of United Nations Enable at: <http://www.un.org/esa/socdev/enable/dissre00.htm> (accessed 1 Aug 2008).

<sup>3</sup> See generally, Gerald Quinn and Theresia Degener, et al, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (Geneva: United Nations, 2003).

<sup>4</sup> See for example, Arlene S. Kanter, “The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities”, (2007) 34 *Syracuse Journal of International Law and Commerce* 287; and Rosemary Kayess and Phillip French, “Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities”, (2008) 8 *Human Rights Law Review* 1.

<sup>5</sup> Tara J. Melish, “Perspectives on the Rights of Persons with Disabilities: The UN CRPD: Historic Process, Strong Prospects, and Why the U.S. Should Ratify”, (2007) 14 *Human Rights Brief* 37 (Winter).

<sup>6</sup> The medical model of disability focuses on the “affliction” caused by the particular condition or impairment and the provision of care, treatment, or protection for the affected individual. In contrast, the social model (a generic term for a theory of disability that emerged in the 1960s) locates the experience of disability in the social environment rather than in particular impairments and thus views disability as a form of social oppression. For discussion of how the concept of the “social model” has evolved over time and certain controversies on its development and usage, see Kayess and French (n 4 above), especially pp 5–8. The human rights model is similar to the social model in that it views people with impairments as rights holders who are often more disabled by physical and attitudinal barriers than by a particular impairment; the terms “social model” and “human rights model” are often used interchangeably, at least in discussions of the CRPD. See for example, Kanter, n 4 above, pp 291–292.

generally, because it embraces a more holistic view of what human rights entails for certain persons.<sup>7</sup>

The CRPD is also historic because of the “unprecedented level of civil society input and engagement” in the drafting process,<sup>8</sup> including substantial input from the Asia Pacific region. One of the milestones in the campaign for a disability treaty occurred in Beijing, where the first World NGO Summit on Disability was held in 2000. The NGO Summit generated the Beijing Declaration on the Rights of People with Disabilities in the New Century, which called for the adoption of an international treaty to “promote and protect the rights of persons with disabilities, and enhance equal opportunities for participation in mainstream society.”<sup>9</sup> The Mexican government subsequently took up the issue and introduced a resolution that was adopted, in December 2001, by the United Nations General Assembly. The resolution established an Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection of the Rights and Dignity of Persons with Disabilities, to consider proposals for a treaty.<sup>10</sup> The resolution also invited governments, non-governmental organisations, and others with an interest in the matter to contribute to the process.

The Ad Hoc Committee began meeting in July 2002 and held a total of eight sessions from 2002–2006.<sup>11</sup> The Ad Hoc Committee encouraged governments to consult people with disabilities and to appoint them to official delegations. Equally important, the Committee authorised representatives of accredited non-governmental organisations (NGOs) to directly participate in the drafting process and established a United Nations Voluntary Fund on Disability to support travel costs. More than 400 representatives of civil society registered for some of the later meetings.<sup>12</sup> The process of

<sup>7</sup> Frédéric Mégret makes this argument in “The Disabilities Convention: Towards a Holistic Concept of Rights”, (2008) 12(2) *International Journal of Human Rights* 261. See also Frédéric Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?”, (2008) 30 *Human Rights Quarterly* 494, at 516 (arguing that the CRPD innovates on traditional human rights concepts by establishing “disability human rights”, rights that are specific to persons with disabilities yet still rooted in the universality of rights and therefore not in a “ghetto” of disability rights).

<sup>8</sup> See Melish, n 5 above.

<sup>9</sup> Beijing Declaration on the Rights of People with Disabilities in the New Century, adopted 12 Mar 2000 at the World NGO Summit on Disability. Available at: [http://www.icdri.org/News/beijing\\_declaration\\_on\\_the\\_right.htm](http://www.icdri.org/News/beijing_declaration_on_the_right.htm) (accessed 1 Aug 2008).

<sup>10</sup> General Assembly Resolution 56/168: Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, adopted 19 Dec 2001. Available at: <http://www.un.org/esa/socdev/enable/disA56168e1.htm> (accessed 1 Aug 2008).

<sup>11</sup> See the website of United Nations Enable for drafts of the treaty, submissions, lists of attendees, and other documents arising from the eight sessions of the Ad Hoc Committee: <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm> (accessed 1 Aug 2008).

<sup>12</sup> Don MacKay (Chair of the Ad Hoc Committee from 2005 onwards), “The United Nations Convention on the Rights of Persons with Disabilities”, (2007) 34 *Syracuse Journal of International Law and Commerce* 323, 327–8.

drafting, debating, and negotiating the language was also followed closely by activists who could not travel because the Ad Hoc Committee published extensive documentation on its website; many organisations submitted detailed comments on the various drafts. The Secretary-General of the United Nations thus described the CRPD as “the first [human rights treaty] to emerge from lobbying conducted extensively through the Internet”.<sup>13</sup>

This unusually open and inclusive drafting process served as a catalyst for regional disability rights organisations, including groups in Asia. In theory, the Asian and Pacific Decade of Disabled Persons (initially set to run from 1993–2002) had already proclaimed a regional shift to a rights-based approach to disability. Government leaders had acknowledged this in the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region, which stated: “negative social attitudes exclude persons with disabilities from an equal share in their entitlements as citizens”.<sup>14</sup> Both China and Hong Kong are signatories to this Proclamation,<sup>15</sup> which acknowledged that Asia is the “fastest growing region in the world” and should be able to devote significant resources to improving the lives of people with disabilities.<sup>16</sup> Thus, there was an expectation that the Asian and Pacific Decade of Disabled Persons would serve as a “catalyst for new policy initiatives”.<sup>17</sup>

In practice, however, the first Asian and Pacific Decade of Disabled Persons had little impact upon national legislation and policies. Accomplishments were “uneven” and there was a “continuing and alarmingly low rate of access to education for children and youth with disabilities ....”<sup>18</sup> In 2002, the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) reported that although 40 countries in the world had adopted laws prohibiting discrimination on the ground of disability, only nine of these countries were in the Asian Pacific region.<sup>19</sup> Similarly, a UNESCAP study concluded that most countries in the region lacked

<sup>13</sup> Kofi Annan, “Secretary-General Hails Adoption of Landmark Convention on the Rights of Persons with Disabilities” (delivered by the Deputy Secretary-General on 13 Dec 2006). Available at: <http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm> (accessed 1 Aug 2008).

<sup>14</sup> Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. Available on the website of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP): <http://www.unescap.org/esid/psis/disability/decade/about.asp#Launching> (accessed 1 Aug 2008).

<sup>15</sup> As of 1 Sep 2001, 41 of the 61 governments in the UNESCAP region, including China and Hong Kong, had signed the Proclamation. See n 14 above.

<sup>16</sup> See Proclamation, n 14 above, para 5.

<sup>17</sup> See Proclamation, n 14 above, para 6.

<sup>18</sup> UNESCAP, *Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific: Note by the Secretariat*, October 2002 (hereinafter referred to as the “Biwako Millennium Framework”). Available at: <http://www.unescap.org/esid/psis/disability/bmf/bmf.html> (accessed 25 Apr 2007).

<sup>19</sup> *Ibid.*, para 53.

legislation embracing the rights-based approach to disability.<sup>20</sup> At the time, Hong Kong stood out as one of the only jurisdictions in Asia to have adopted a law providing an enforceable right to equality for persons with disabilities.<sup>21</sup> The decade was consequently extended for a second decade (until 2012) and a regional framework for action, known as the Biwako Millennium Framework For Action Towards an Inclusive, Barrier Free and Rights-Based Society for Persons with a Disability in Asia and the Pacific, was adopted to give more concrete meaning to the philosophical shift to a rights-based model. The Biwako Millennium Framework provided specific targets, one of which was to encourage governments to enact legislation requiring equal opportunities and treatment of persons with disabilities.<sup>22</sup>

The extended Asian and Pacific Decade of Disabled Persons (2003–2012) overlapped with the meetings of the United Nations Ad Hoc Committee on the CRPD, inspiring regional lobbying on the content of the treaty. For example, in 2003 an Expert Group Meeting was held in Bangkok, with 125 representatives of nongovernmental organisations and government officials (including Mr. Stephen King Leung Pang, Commissioner for the Commission for Rehabilitation, who represented Hong Kong).<sup>23</sup> The Bangkok meeting generated specific recommendations, including that “the lack of provision of reasonable accommodation and/or positive actions to eliminate barriers to full participation” should be considered a form of discrimination.”<sup>24</sup> The Bangkok recommendations were presented at the Second Session of the Ad Hoc Committee, held in New York in June 2003, where Member States unanimously agreed to begin

<sup>20</sup> UNESCAP, *Disability at a Glance: A Profile of 28 Countries and Areas in Asia and the Pacific*, (2004), p 3 (methodology of study) and p 12 (data on domestic legislation).

<sup>21</sup> In 1995 Hong Kong enacted the Disability Discrimination Ordinance (Cap. 487, Laws of Hong Kong) (DDO), which is discussed below in greater detail. In 2000 the DDO was described as “one of the most far reaching anti-discrimination laws for disabled persons” in the region. Theresia Degener, “Report: International Disability Law – A New Subject on the Rise: The Interregional Experts’ Meeting in Hong Kong, December 13-17”, (2000) 18 *Berkeley Journal of International Law* 180, 185. See also Carole J. Petersen, “A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong’s Disability Law”, (2005) 25 *Disability Studies Quarterly* (4).

<sup>22</sup> See n 18 above, paras 14(1) and 53. The Biwako Millennium Framework was reviewed and supplemented at a regional mid-decade review. See *Biwako Plus Five: Further Efforts Towards Inclusive, Barrier-Free and Rights-Based Society For Persons With Disabilities in Asia and the Pacific*, adopted at the High-Level Intergovernmental Meeting on the Midpoint Review of the Asian and Pacific Decade of Disabled Persons, 2003–2012, 21 Sep 2007 (hereinafter referred to as “Biwako Plus Five”). Available at: [http://www.unescap.org/esid/psis/disability/bmjf/APDDP2\\_2E.pdf](http://www.unescap.org/esid/psis/disability/bmjf/APDDP2_2E.pdf) (accessed 10 Nov 2008).

<sup>23</sup> See Expert Group Meeting and Seminar on an International Convention to Protect and Promote the Rights and Dignity of Persons with Disabilities, Bangkok, Thailand, 2–4 June 2003. Available at: <http://www.worldenable.net/bangkok2003/reportannex1.htm> (accessed 1 Aug 2008).

<sup>24</sup> See Bangkok Recommendations on the Elaboration of a Comprehensive and Integral International Convention to Promote and Protect and the Rights and Dignity of Persons with Disabilities, 4 June 2003, para 13e. Recommendations and report on the seminar are available at: <http://www.worldenable.net/bangkok2003/reportannex1.htm> (accessed 1 Aug 2008).

drafting a proposed convention. A Working Group was then established to develop a consolidated draft text.

Subsequently, UNESCAP sponsored a series of regional workshops to critically review the draft of the proposed treaty. Thailand was the host country for several meetings, including workshops on the need to incorporate a gender perspective<sup>25</sup> and a workshop that produced a draft text for the treaty (many elements of which would eventually be included in the final text).<sup>26</sup> An important regional meeting was also held in Beijing, leading to the adoption of the Beijing Declaration on Elaboration of an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities.<sup>27</sup> In a keynote speech, Mr Sheen Zhifei, the Deputy Secretary General of China's State Council Coordination Committee on Disability stressed the urgent need for a convention that would be both binding and comprehensive – covering rehabilitation, education, employment, social security and accessibility – and he called on more states to contribute to the process.<sup>28</sup> Although it has been observed that the Chinese government was “not always as supportive of a strong rights and enforcement framework as one might have hoped”,<sup>29</sup> there is no doubt that China was an early supporter of the general concept of a human rights treaty to advance the rights of persons with disabilities.

The Asia Pacific Forum of National Human Rights Institutions (APF) was also active in studying and commenting on drafts of the CRPD. The APF is an important organisation in the region's human rights movement. It was established in 1996 after the first regional meeting of national human

<sup>25</sup> See “UNESCAP Workshop on Women and Disability: Promoting Full Participation of Women with Disabilities in the Process of Elaboration on an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities”, 18–22 Aug 2003 and 13 Oct 2003, Bangkok, Thailand, especially the Summary of Recommendations and Final Report. Available at: <http://www.worldenable.net/wadbangkok2003> (accessed 1 Aug. 2008).

<sup>26</sup> See “Final Report of the Regional Workshop towards a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities”, Bangkok, 14–17 Oct 2003, including the suggested draft of the treaty. Available at: <http://www.worldenable.net/bangkok2003a/bangkokdraftrev.htm> (accessed 1 Oct 2008).

<sup>27</sup> See “Beijing Declaration on Elaboration of an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities”, adopted in Beijing, 7 Nov 2003, at the UN-ESCAP Regional Meeting on an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities. Available at: <http://www.worldenable.net/beijing2003/beijing-declaration.htm> (accessed 1 Oct 2008).

<sup>28</sup> See Draft Report of Regional Meeting on an International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Beijing, China, 4–7 Nov 2003 (issued without formal editing). Available at: <http://www.worldenable.net/beijing2003/finalreport.htm#II> (accessed 1 Oct 2008).

<sup>29</sup> Andrew Byrnes, “The Disability Discrimination Ordinance, the UN Convention on the Rights of Persons with Disabilities, and Beyond: Achievements and Challenges after Ten Years of Hong Kong Anti-discrimination Legislation”, keynote presentation at the conference *Our Ten Years under the DDO – Moving Forward, Changing Cultures*, organized by the Hong Kong Equal Opportunities Commission, Hong Kong, 24 January 2008, [2008] UNSWLRS 13. Available at: <http://law.bepress.com/unswwps/ftrps08/art13/> (accessed 15 Nov 2008).

rights institutions from Asia Pacific countries.<sup>30</sup> In order to be a member of the Forum, a national human rights institution must be established in compliance with the United Nations Principles relating to the Status of National Institutions, which are commonly referred to as the “Paris Principles”.<sup>31</sup> Among other things, the Paris Principles require that a national human rights institution enjoy absolute independence, despite the fact that it is publicly funded.<sup>32</sup> This is a particularly important principle in Asia where public bodies often do not enjoy independence from the executive branch, making it difficult for them to criticise government policies.<sup>33</sup>

It is noteworthy that the APF chose the CRPD as one of its main projects.<sup>34</sup> This indicates that the member institutions recognise disability as a mainstream human rights issue, rather than as a social welfare issue (the approach still taken by many governments in the Asia Pacific region). In 2003, the APF held a regional workshop in India<sup>35</sup> that generated a special Working Group on Disability to coordinate submissions to the Ad Hoc Committee. As a result, the APF sent a delegation (which functioned as part of the National Human Rights Institutions delegation)

<sup>30</sup> See “Asia Pacific Forum: Advancing Human Rights in Our Region”. Available at: [http://www.asiapacificforum.net/about/downloads/about-the-apf/APF\\_E-Brochure.pdf](http://www.asiapacificforum.net/about/downloads/about-the-apf/APF_E-Brochure.pdf) (accessed 19 Oct 2008).

<sup>31</sup> The Paris Principles were adopted by the United Nations Commission on Human Rights in 1992 and by the United Nations General Assembly in 1993. See GA Resolution 134, 48th Session, 85th Meeting, UN Doc. A/RES/48/134 (1993).

<sup>32</sup> At present the APF has fourteen full member institutions from Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, the Philippines, Republic of Korea, Sri Lanka, Thailand, and Timor Leste. There are also three associate members from Qatar, Maldives, and Palestine. It is doubtful that all of these member institutions enjoy full independence from their governments, but the fact that they have been accepted into APF indicates that they meet at least the minimum requirements of the Paris Principles. For further analysis of the APF membership criteria and review process, see Andrew Byrnes, Andrea Durbach, and Catherine Renshaw, “Joining the Club: the Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the Advancement of Human Rights Protection in the Region”, [2008] UNSWLRS 39. Available at: <http://law.bepress.com/unswwps/flrps08/art39/> (accessed 10 Nov 2008).

<sup>33</sup> The Hong Kong Equal Opportunities Commission cannot join the APF, as it is not a “national” body and does not have a sufficiently broad human rights jurisdiction (its enforcement powers are confined to specific anti-discrimination ordinances). For a discussion of the extent to which it complies with other aspects of the Paris Principles, see Carole J. Petersen, “The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?” (2003) 33 HKLJ 513.

<sup>34</sup> When the treaty was still being drafted the APF listed the CRPD as one of three “Current Projects”, together with a project on the elimination of torture and a project on trafficking. In 2008, the webpage expanded the list but continued to list disability as one of its eleven key issues. For its recent work on disability see <http://www.asiapacificforum.net/issues/disability> (accessed 15 Oct 2008).

<sup>35</sup> See the Final Report of the workshop, entitled: “Promoting the Rights of People with Disabilities: Towards a New UN Convention”, organized by the APF and hosted by the National Human Rights Commission of India. Available at: <http://www.asiapacificforum.net/services/training/regional-workshops/disability/downloads/conclusion/final.pdf> (accessed 15 Oct 2008).

to most of the meetings of the Ad Hoc Committee and it made lengthy submissions on various drafts of the treaty.<sup>36</sup>

The Ad Hoc Committee completed the drafting of the CRPD in 2006, a remarkably short period of time given the number of people and organisations that participated in the process and contributed submissions. In December 2006, the United Nations General Assembly approved the text of the CRPD, together with the Optional Protocol to the CRPD, a separate but related treaty that contains an individual complaints procedure and an inquiry procedure.<sup>37</sup> The Deputy Permanent Representative of China, Mr Liu Zhenmin, made a statement that highlighted the role that China had played by promoting the treaty in the “early days” and contributing to the work of the Ad Hoc Committee.<sup>38</sup> The CRPD was opened for ratification on 30 March 2007. Eighty-two nations signed the treaty on that first day (including China) and one nation, Jamaica, ratified it.<sup>39</sup> This is the largest number of opening signatures ever recorded for a United Nations human rights treaty, reflecting the widespread support that CRPD enjoys in the international community.<sup>40</sup>

## II. China’s Ratification of the CRPD

China’s decision to sign the treaty in March 2007 did not impose any immediate obligations to reform laws or policies because China was not yet a State Party and the treaty was, in any event, not yet in force. Pursuant to Article 45, the CRPD needed twenty ratifications before it would come into force and some human rights treaties take many years to obtain the necessary ratifications. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the “Migrant Workers’ Convention”) was opened for ratification in 1990 but did not obtain twenty ratifications until 2003. The Committee on Migrant Workers began meeting in 2004 but it is far less busy than other

<sup>36</sup> See for example, the Submission by the Asia Pacific Forum of National Human Rights Institutions to the 4th Session of the Ad Hoc Committee on the Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Aug-Sep 2004. Available at: <http://www.asiapacificforum.net/international/disability/working-group/index.htm> (accessed 1 May 2007).

<sup>37</sup> See Optional Protocol to the Convention on the Rights of Persons with Disabilities. Available at: <http://www2.ohchr.org/english/law/disabilities-op.htm> (accessed 10 Nov 2008).

<sup>38</sup> See UN Enable, Statements made on the Adoption of the Convention on the Rights of Persons with Disabilities, 13 Dec 2006. Available at: <http://www.un.org/esa/socdev/enable/conwstatementgov.htm#ch> (accessed 1 Aug 2008).

<sup>39</sup> See International Convention on the Rights of Persons with Disabilities: Status of Ratifications. Available at: <http://www2.ohchr.org/english/bodies/ratification/15.htm> (accessed 15 Nov 2008).

<sup>40</sup> See Rosemary Kayess and Phillip French, n 4 above, at 2.



human rights treaty bodies because the Migrant Workers' Convention still only has 39 States Parties.<sup>41</sup>

National governments have been much quicker to ratify the CRPD, although it arguably imposes greater obligations than the Migrant Workers' Convention, due to its wider scope. The CRPD obtained its twentieth State Party (Ecuador), on 3 April 2008, barely a year after it was opened for ratification.<sup>42</sup> The treaty thus entered into force on 3 May 2008, thirty days after the deposit of the twentieth instrument of ratification or accession to the Convention. The Optional Protocol to the CRPD also went into force on 3 May 2008. If a country is a State Party to the Optional Protocol then individuals who allege that they are victims of a violation of the CRPD by that State Party will be able to send complaints (referred to as "communications") to the Committee on the Rights of Persons with Disabilities.<sup>43</sup> The Optional Protocol also provides for an international inquiry procedure for particularly grave or systematic violations of the Convention.<sup>44</sup>

The rapid ratification rate of the CRPD meant that China had to move quickly if it wanted to be viewed as a leader in disability policy in Asia. In September 2007, Mr Shen Zhifei, the Vice-President of the China Disabled Persons' Federation and Vice Secretary of the State Council Working Committee on Disability, gave a speech at an intergovernmental meeting in Bangkok at the midpoint of the extended Asian and Pacific Decade of Disabled Persons, which adopted Biwako Plus Five.<sup>45</sup> He assured government representatives that China was moving towards ratification and that it was already undertaking domestic law reform as a preliminary step in the ratification process.<sup>46</sup>

<sup>41</sup> See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: Status of Ratifications. Available at: <http://www2.ohchr.org/english/bodies/ratification/13.htm> (accessed 15 Oct 2008).

<sup>42</sup> See n 39 above. By November 2008, the CRPD had 137 signatories and 41 States Parties, far exceeding the Migrant Workers' Convention which has been open for ratification for almost two decades.

<sup>43</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 1. Available at: <http://www2.ohchr.org/english/law/disabilities-op.htm> (accessed 10 Oct 2008). According to Article 2, a communication will be deemed "inadmissible" (and will not be considered) if the complainant has not first exhausted his or her domestic remedies.

<sup>44</sup> *Ibid.*, Art 6.

<sup>45</sup> See Biwako Plus Five, n 22 above.

<sup>46</sup> See text of speech by Mr. Shen Zhifei at the High-level Intergovernmental Meeting on the Midpoint Review of the Asian and Pacific Decade of Disabled Persons (2003–2012) Bangkok, Thailand, 18–21 Sep 2007. Available on the website of the China Disabled Persons' Federation: [http://www.cdpf.org.cn/english/exchanges/attache/2008-04/10/content\\_84880.htm](http://www.cdpf.org.cn/english/exchanges/attache/2008-04/10/content_84880.htm) (accessed 30 Aug 2008).

For example, in 2007 China issued new Regulations on Employment of People with Disabilities<sup>47</sup> and started the process of revising the 1990 Law on the Protection of Disabled Persons. Although the 1990 Law purported to protect the rights of persons with disabilities, it largely reflected a medical approach, as opposed to a rights-based or social approach, to disability. The law defined disability as an “abnormality” and certain provisions were overtly patronising. For example, the 1990 law encouraged disabled persons to “display an optimistic, and enterprising spirit, have a sense of self-respect, self-confidence, self-strength and self reliance, and make contributions to the socialist construction.”<sup>48</sup>

Moreover, although the 1990 law stated that people with disabilities “shall enjoy equal rights”, it did not define unlawful discrimination, making it almost impossible to enforce. This is especially problematic because disability discrimination has been rampant in China, not only in the growing private sector, but also in the public sector. Employers have routinely refused to hire individuals who are Hepatitis B carriers, although this excludes approximately 10 per cent of the population.<sup>49</sup> As recently as 2004, the Guangdong public service was openly excluding applicants with a variety of chronic diseases and physiological conditions that appeared to have no relationship to one’s ability to perform a job – such as “an obvious squint”, moles, and “too many fillings” in one’s teeth.<sup>50</sup> Thus, although China’s official statistics show a significant increase in the employment rate of persons with disabilities, the government has not achieved this by battling discrimination in the employment market, but rather by establishing quotas and “welfare enterprises or sheltered or supportive employment”.<sup>51</sup> This contradicts one of the key goals of the CRPD, which is to promote inclusiveness and avoid segregation. China has also been strongly criticised for its lack of commitment to the concept

<sup>47</sup> See Regulations on the Employment of Persons with Disabilities, which came into force on 1 May 2007. An unofficial English translation is available on the website of the China Disabled Persons’ Federation: [http://www.cdpcf.org.cn/english/lawsdoc/content/2008-04/10/content\\_84888.htm](http://www.cdpcf.org.cn/english/lawsdoc/content/2008-04/10/content_84888.htm) (accessed 10 Nov 2008).

<sup>48</sup> See Law of the People’s Republic of China on the Protection of Disabled Persons (1990). A copy of the unofficial English translation, obtained from the website of the China Disabled Persons’ Federation ([http://www.cdpcf.org.cn/english/info\\_01.htm](http://www.cdpcf.org.cn/english/info_01.htm), accessed 1 May 2007), is on file with the author but has since been replaced by the amended law.

<sup>49</sup> Ronald C. Brown, “China’s Employment Discrimination Laws During Economic Transition”, (2006) 19 *Columbia Journal of Asian Law* 361, 382. See also Bonny Ling and Wing Lam, “Hepatitis B: A Catalyst for Anti-Discrimination Reforms?”, (2007) (2) *China Rights Forum* 67. Available at: [http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2\\_Hepatitis.pdf](http://hrichina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Hepatitis.pdf) (accessed 10 Oct 2008).

<sup>50</sup> Brown, “China’s Employment Discrimination Laws During Economic Transition”, p 383.

<sup>51</sup> Eric G. Zhang, “Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China”, (2007) 34 *Syracuse Journal of International Law and Commerce* 517, 545–554.

of inclusive education, an essential step in developing meaningful employment opportunities for people with disabilities.<sup>52</sup>

The amended Law on the Protection of Disabled Persons was enacted by the National People's Congress in April 2008 and promulgated in July 2008.<sup>53</sup> The law still contains a medical definition of disability, lacks a definition of unlawful discrimination (making enforcement highly problematic), and emphasises "sheltered" employment for people with disabilities.<sup>54</sup> But the amendments, combined with other recent regulatory changes, apparently made the central government feel sufficiently confident to ratify the treaty. In June 2008, the Standing Committee of the National People's Congress approved the CRPD in its plenary session, noting that China has approximately 80 million people with disabilities.<sup>55</sup> China did not, however, ratify the Optional Protocol to the CRPD.<sup>56</sup> This is not surprising because China has not accepted any of the individual complaints procedures or inquiry procedures under the United Nations human rights treaties to which it has become a State Party.

China has thus undertaken an obligation to prepare, within two years, an extensive report to the United Nations Committee on the Rights of Persons with Disabilities on the steps it has taken to implement the treaty and the barriers to the realisation of rights. Unless significant changes are made before that time, the Chinese government can expect to receive a fairly strong critique of its legal and policy framework. Of course, the central government could have taken an easier path and just remained a signatory to the CRPD, as it has done with the International Covenant on Civil and Political Rights, which it signed in 1998 but has not yet ratified.<sup>57</sup> A signatory nation is obligated to "refrain from acts which would defeat the object

<sup>52</sup> See for example, Yanhui Pang and Dean Richey, "The Development of Special Education in China", (2006) 21(1) *International Journal of Special Education*, especially pp 81–84; and Nancy J. Ellsworth and Chun Zhang, "Progress and Challenges in China's Special Education Development", (2007) 28 (1) *Remedial and Special Education*, especially pp 58–63.

<sup>53</sup> An unofficial English translation of the amended Law on the Protection of Persons with Disabilities, together with the decree bringing it into force on 1 July 2008, has been published by the China Disabled Persons' Federation. Available at: [http://www.cdpf.org.cn/english/lawsdoc/content/2008-04/10/content\\_25056081.htm](http://www.cdpf.org.cn/english/lawsdoc/content/2008-04/10/content_25056081.htm) (accessed 10 Aug 2008).

<sup>54</sup> *Ibid*, especially Arts 2 and 32. See also the Regulations on the Employment of Persons with Disabilities, see n 47 above (accessed 10 Aug 2008).

<sup>55</sup> See "Legislature Approves Int'l Convention on Rights of Handicapped", 27 June 2008, at GOV.cn, the Chinese Government's Official Web Portal: [http://english.gov.cn/2008-06/27/content\\_1028927.htm](http://english.gov.cn/2008-06/27/content_1028927.htm) (accessed 10 Aug 2008).

<sup>56</sup> As of November 2008, the Optional Protocol had 25 States Parties and 79 Signatories. The text of the Optional Protocol can be viewed at: <http://www2.ohchr.org/english/law/disabilities-op.htm> (accessed 21 Nov 2008).

<sup>57</sup> See International Covenant on Civil and Political Rights: Status of Ratifications. Available at: <http://www2.ohchr.org/english/bodies/ratification/4.htm> (accessed 1 Oct 2008).

and purpose of the treaty,<sup>58</sup> but in practice has no real obligations as it is not subject to the international monitoring process. This approach would have allowed China to undertake more gradual law reform but would have been inconsistent with its recent discourse on the rights of persons with disabilities. By ratifying the CRPD in 2008, when there were only a few other States Parties from the Asia Pacific region, China can justifiably claim to be a leader in the regional disability rights movement. This was, no doubt, particularly important to the central government in the summer of 2008, as it was about to host the Olympic Games<sup>59</sup> and the Paralympic Games.<sup>60</sup>

Moreover, had China remained a mere signatory, it would not have been able to participate in the first session of the Conference of States Parties to the Convention, which began meeting in New York on 31 October 2008, or to nominate or vote for members of the first Committee on the Rights of Persons with Disabilities.<sup>61</sup> The timing of the ratification indicates that this consideration may have influenced China's decision: the government submitted its instrument of ratification on 1 August 2008. Pursuant to Article 45, the Convention enters into force for a State Party 30 days after it deposits the instrument of ratification or accession with the Secretary-General. Thus, by submitting its instrument on 1 August, China became a State Party to the Convention on 31 August and was eligible to submit a nomination for the Committee just before the first due date of 3 September 2008.

China immediately nominated Ms Yang Jia, a professor and Founding Director of the Women's Committee of China's Association of the Blind and a Member of the World Blind Union's Asia-Pacific Region Women's Committee.<sup>62</sup> Article 34(4) of the CRPD states that States Parties should give consideration, when forming the committee, to the goal of achieving "equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities."<sup>63</sup> Ms Yang was easily

<sup>58</sup> See the Vienna Convention on the Law of Treaties, Art 18, available at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (accessed 20 Apr 2007).

<sup>59</sup> See the Official Website of the Beijing 2008 Olympic Games, 8–24 Aug 2008; available at: <http://en.beijing2008.cn/> (accessed 1 Oct 2008).

<sup>60</sup> See the Official Website of the Beijing 2008 Paralympic Games, 6–17 Sep 2008; available at: <http://en.paralympic.beijing2008.cn/index.shtml> (accessed 1 Oct 2008).

<sup>61</sup> Article 34 of the Convention provides for the establishment of a Committee on the Rights of Persons with Disabilities, consisting of twelve experts of high moral standing and recognised competence and experience, to be elected by the States Parties.

<sup>62</sup> The list of nominees (with their biographical information) is available on the website of the Committee for the Rights of Persons with Disabilities: <http://www2.ohchr.org/english/bodies/crpd/crpdsl.htm> (accessed 16 Oct 2008).

<sup>63</sup> Many non-governmental organisations had argued that a majority of members of the Committee should be persons with disabilities but the CRPD does not require this.

elected as the only nominee from East Asia and one of only seven women nominees (compared to 17 men).<sup>64</sup> Pursuant to Article 34(3), Committee members serve in their personal capacities and are not supposed to represent their governments. Still, it is a matter of prestige for China to have a member on the first Committee; it may also help to ensure that certain perspectives of the Chinese government are reflected in the Committee's procedures and approaches.

### III. Application of the CRPD to Hong Kong

When the Standing Committee of the National People's Congress first approved the CRPD, in June 2008, it was not immediately clear that China would apply the treaty to the Hong Kong Special Administrative Region. Article 153 of the Basic Law, Hong Kong's constitutional instrument, expressly provides for the possibility that an international treaty may apply on only one side of the Hong Kong/China border.<sup>65</sup> In some cases, this aspect of the "one country two systems" model has allowed Hong Kong to maintain a higher standard of human rights than exists in Mainland China – as evidenced by the continued application to Hong Kong of the ICCPR, which has not yet been ratified by mainland China.<sup>66</sup> However, Article 153 also permits Hong Kong to avoid certain treaty obligations, as evidenced by its longstanding refusal to be bound by the 1951 Refugee Convention. Although both the United Kingdom and China are States Parties to the Refugee Convention, the Hong Kong government has successfully resisted application of the treaty. The local government takes the position that it cannot grant asylum because Hong Kong is small, densely populated, and relatively prosperous, making it vulnerable to possible abuses by potential asylum claimants. This opposition to granting asylum has been cited by

<sup>64</sup> See Results of the Elections to the Committee on the Rights of Persons with Disabilities. Available on the Committee's website at: [http://www2.ohchr.org/english/bodies/crpd/docs/Elections\\_Result\\_08.pdf](http://www2.ohchr.org/english/bodies/crpd/docs/Elections_Result_08.pdf) (accessed 20 Nov 2008).

<sup>65</sup> Article 153 of the Basic Law provides, in relevant part: "The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, after seeking the views of the government of the Region. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region." Available at: [http://www.basiclaw.gov.hk/en/basiclawtext/chapter\\_7.html](http://www.basiclaw.gov.hk/en/basiclawtext/chapter_7.html) (accessed 10 Nov 2008).

<sup>66</sup> For analysis of the impact of the ICCPR and other international human rights treaties in Hong Kong, see Carole J. Petersen, "Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence", in Fu Hualing, Lison Harris, and Simon N.M. Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York: Palgrave Macmillan, 2007).

officials as the chief reason that the Chinese government decided not to extend the Refugee Convention to Hong Kong after the handover in 1997.<sup>67</sup>

In the case of the CRPD, however, it would have been disingenuous for the Hong Kong government to ask to be left out of the ratification because Hong Kong is in a better position than mainland China to comply with the treaty. To its credit, the Hong Kong Equal Opportunities Commission (EOC), the independent statutory body charged with enforcing the Disability Discrimination Ordinance (DDO), quickly suggested that the CRPD be extended to Hong Kong. In December 2006 the EOC issued a press release welcoming the General Assembly's adoption of the treaty and calling for early ratification by all members of the United Nations.<sup>68</sup> The EOC subsequently issued a press release welcoming the decision by the Standing Committee of the National People's Congress to ratify and expressing hope that the CRPD would be extended to Hong Kong in the "near future".<sup>69</sup> Raymond Tang, the Chairperson of the EOC, urged "the early commencement of negotiations between the Central Government and the SAR government" regarding the treaty's extension to Hong Kong.<sup>70</sup>

In August 2008, the Chairperson of the Hong Kong EOC contributed to a study (conducted by United Nations High Commissioner for Human Rights) on the key legal measures necessary for ratification and implementation of the CRPD. The EOC described its enforcement powers and reiterated that it was prepared to do its part to implement the treaty.<sup>71</sup> By this time, it appeared that China had decided to apply the CRPD to Hong Kong. In its communication to the Secretary General (effected 1 August 2008), the Chinese government stated that the CRPD would apply to both

<sup>67</sup> See judgment of Justice Hartman in *C, AK, KMF, VK, BF, and Yam v Director of Immigration* (HCAL 82/2007, 18 Feb 2008), para 151, quoting the 28 Feb 2007 affirmation of Principal Assistant Secretary for Security, Mr Chu King Man: "The [Hong Kong] Government both before and after the handover has consistently rejected the notion that Hong Kong is subject to the principle of refugee *non-refoulement* as a rule of customary international law. That rejection lay behind not extending the UK's obligations under the Refugee Convention to Hong Kong before the handover; and the later decision not to extend the People's Republic of China's obligations under the Refugee Convention to the HKSAR." Available at: <http://legabref.judiciary.gov.hk/lrs/common/ju/judgment.jsp> (accessed 15 Oct 2008).

<sup>68</sup> See Hong Kong EOC Press Release: "EOC Chair urges early ratification of new United Nations Convention on Disability", 14 Dec 2006. Available at: <http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=7055> (accessed 10 Oct 2008).

<sup>69</sup> See Hong Kong EOC Press Release: "EOC welcomes ratification of the United Nations Convention on the Rights of Persons with Disabilities by the National People's Congress Standing Committee", 3 July 2008. Available at: <http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=7692> (accessed 10 Oct 2008).

<sup>70</sup> See n 69 above.

<sup>71</sup> See letter dated 14 Aug 2008 from Raymond Tang, Chairperson of the Hong Kong EOC, to Mr. Ibrahim Wani, Chief, Development, Economic and Social Issues Branch, United Nations High Commissioner for Human Rights. Available at: <http://www2.ohchr.org/english/issues/disability/docs/consultation/NHRIs/Dept%20HongKong114082008.pdf> (accessed 20 Nov 2008).

the Hong Kong and Macao Special Administrative Regions.<sup>72</sup> However, the central government also entered a declaration for Hong Kong, stating that the CRPD would have no impact upon Hong Kong's immigration laws, a topic that will be discussed further in the next section of this article.

#### IV. Implications of the CRPD for Hong Kong

As a State Party, China will be required to submit, within two years of ratification, a comprehensive initial report on the measures taken to give effect to its obligations under the CRPD. The Committee on the Rights of Persons with Disabilities will review the initial report, request additional information if required, and issue concluding comments at the end of the review process. Thereafter, periodic reports shall be submitted at least every four years.

The Hong Kong government will have to prepare its own initial report, which will be submitted as part of China's report. If the Committee on the Rights of Persons with Disabilities follows the practice of other international monitoring bodies, it will consider Hong Kong's report as a distinct document and issue concluding comments that are specific to Hong Kong. A delegation from the Hong Kong government will also be expected to come to the hearing and answer questions when the report is reviewed. Non-governmental organisations from Hong Kong will almost certainly supplement Hong Kong's official report, particularly if they believe that the government's report presents an unduly positive assessment or has failed to identify important barriers to implementation of the treaty. The Hong Kong government should therefore commence, sometime in 2009, a process for researching and drafting its initial report under Article 45 of the CRPD. The government needs to study a wide range of laws and policies, as well as the actual experiences of people with disabilities. As the CRPD is an unusually long and detailed treaty, the issues identified below should only be considered as a starting point. The government should actively consult people with disabilities – as well as advocacy groups, professionals who work in related fields, and other representatives of civil society – in order to construct a comprehensive outline of issues which can then be circulated to the public for comment.

<sup>72</sup> See Convention on the Rights of Persons with Disabilities, China: Communication in Respect of Hong Kong and Macao, effected on 1 Aug 2008, English translation issued by the Secretary General on 12 Aug 2008, Ref: C.N. 579.2008.TREATIES-32 (Depositary Notification). Available on the ratifications webpage of the CRPD, under the heading Declarations and Reservations: China (Hong Kong and Macau), at: <http://www2.ohchr.org/english/bodies/ratification/15.htm> (accessed 10 Oct 2008).

*The overly broad reservation for Hong Kong immigration law*

The Chinese government does not appear to have entered any reservations or declarations with respect to the application of the CRPD in mainland China or Macau. With respect to Hong Kong, however, the central government made the following statement:

“The application of the provisions regarding *Liberty of movement and nationality* of the Convention on the Rights of Persons with Disabilities to the Hong Kong Special Administrative Region of the People’s Republic of China, shall not change the validity of relevant laws on immigration control and nationality application of the Hong Kong Special Administrative Region of the People’s Republic of China.”<sup>73</sup>

This is apparently intended to be a reservation to Article 18 of the CRPD, which protects rights to nationality and liberty of movement. Article 18 states:

- “1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
  - (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
  - (b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
  - (c) Are free to leave any country, including their own;
  - (d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.
2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.”

It is not clear why the Hong Kong government found it necessary to ask for such a sweeping reservation regarding the application of this Article to immigration law. It may be that the local government did so out of habit and because it tends to be wary of any judicial review of decisions relating to

<sup>73</sup> *Ibid.*



immigration.<sup>74</sup> A similarly broad reservation for “immigration legislation” applies to the application of the ICCPR to Hong Kong and to the application of the Convention on the Elimination of All Forms of Discrimination (CEDAW) to Hong Kong. These reservations have, however, often been criticised by international monitoring bodies.<sup>75</sup>

The government may argue that the reservation for immigration law is necessary for disease control measures, such as the body temperature checks that were adopted after the outbreak of Severe Acute Respiratory Syndrome (SARS).<sup>76</sup> However, measures that are reasonably required to control the spread of contagious diseases can be authorized through specific legislation that would not violate the CRPD. For example, the Prevention and Control of Disease Ordinance expressly empowers the Secretary for Food and Health to make regulations (a) “for the purpose of preventing the introduction into, the spread in and the transmission from, Hong Kong of any disease, source of disease or contamination”.<sup>77</sup> Regulations may include the “prohibition or regulation of admission of persons into Hong Kong or their movements within or their departure from Hong Kong”.<sup>78</sup> This legislation was enacted in May 2008 for the express purpose of complying with the International Health Regulations 2005 (IHR 2005) of the World Health Organization (WHO).<sup>79</sup> All members of WHO (more than 190 governments) are obligated to comply with IHR 2005, including many States Parties to the CRPD. But WHO has emphasized that the new measures must be implemented in a sensitive manner and that “... States are required to treat travelers with respect for their dignity, human rights

<sup>74</sup> See generally Petersen, n 66 above.

<sup>75</sup> See for example, the Report of the Committee on the Elimination of Discrimination Against Women, Concluding Comments, 20th Session, 1999, at para 333. The Committee criticized the reservations entered on behalf of Hong Kong and urged the government to amend any laws that are inconsistent with CEDAW, including those related to immigration, so that it could withdraw the reservations. Available at: [http://www2.ohchr.org/english/bodies/cedaw/docs/ChinaCO20th\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ChinaCO20th_en.pdf) (accessed 10 Oct 2008).

<sup>76</sup> See generally the 2003 report of the Severe Acute Respiratory Syndrome (SARS) Expert Committee, which was established by the Chief Executive to review the management and control of the SARS outbreak in Hong Kong. Available at: <http://www.sars-expertcom.gov.hk> (accessed 1 Oct 2008).

<sup>77</sup> See Prevention and Control of Disease Ordinance (Cap. 599, Laws of Hong Kong), s 7(1)(a), which provides the power to make regulations. For the regulations adopted thus far, see Prevention and Control of Disease Regulations (Cap. 599A, Laws of Hong Kong), especially s 6 which puts a duty on the operators of cross-boundary aircrafts, vessels and vehicles to report passengers who they suspect are carrying a specified disease.

<sup>78</sup> See Prevention and Control of Disease Ordinance (Cap. 599, Laws of Hong Kong), s 7(1)(a), s 7(2)(e)(i).

<sup>79</sup> See the Legislative Council Brief, prepared by the Food and Health Bureau for the Bills Committee on Prevention and Control of Disease Bill (Dec 2007). Available at: <http://www.legco.gov.hk/yr0708/english/bc/bc52/general/bc52.ht> (accessed 10 Oct 2008).

and fundamental freedoms ... ”<sup>80</sup> As long as the Hong Kong government complies with that fundamental principle then it is unlikely that legislation implementing IHR 2005 would be deemed to violate the CRPD.

There may be some other legitimate concerns regarding the effect of the CRPD on Hong Kong's immigration laws and policies. If so, then the government should conduct a review to articulate those concerns and draft narrower language for a revised declaration. For example, when Australia ratified the CRPD it made the following declaration:

“Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.”<sup>81</sup>

Although this declaration has also been criticised on the ground that it could perpetuate discrimination,<sup>82</sup> it is preferable to the sweeping reservation entered for Hong Kong. One cannot help but wonder what the Hong Kong immigration authorities were concerned about when they (presumably) suggested that Hong Kong's immigration laws should be entirely exempted from the Disability Convention.<sup>83</sup> If the Hong Kong government insists on keeping this overly broad reservation then it should be prepared to justify it because it will almost certainly be asked to do so by the Committee on the Rights of Persons with Disabilities. Rather than wait for the Committee's concluding comments, the Hong Kong Legislative Council should ask the Hong Kong government to identify any laws and policies that might conflict with the CRPD so that it can consider whether amendments are necessary. The Australian Parliament's Joint Standing Committee on Treaties has reached a similar conclusion, recommending that “a review

<sup>80</sup> See WHO, Frequently asked questions about the International Health Regulations (2005). Available at: <http://www.who.int/csr/ihr/howtheywork/faq/en/index.html> (accessed 10 Oct 2008).

<sup>81</sup> See CRPD, Ratification of Australia, effected 17 July 2008, Reference: C.N.523.2008.TREATIES-27 (Depositary Notification). Available at: [http://www2.ohchr.org/english/bodies/ratification/docs/Australia\\_en.pdf](http://www2.ohchr.org/english/bodies/ratification/docs/Australia_en.pdf) (accessed 10 Oct 2008).

<sup>82</sup> See for example, the Submission of 12 June 2008 by the Ethnic Communities Councils of Australia to the Australian Parliament's Joint Standing Committee on Treaties (arguing against any interpretive declaration regarding Art 18 of the CRPD). Available at: <http://www.aph.gov.au/house/committee/jsct/4june2008/subs/sub4.pdf> (accessed 18 Nov 2008).

<sup>83</sup> One policy that comes to mind is the government's limits on the entrance of mainland Chinese women in an “advanced state of pregnancy”. See Hong Kong Government, Press release: New measures on obstetric services and immigration control announced (16 Jan 2007) <http://www.info.gov.hk/gia/general/200701/16/P200701160184.htm> (accessed 1 Oct 2008).

be carried out of the relevant provisions of the Migration Act and the administrative implementation of migration policy, and that any necessary action be taken to ensure that there is no direct or indirect discrimination against persons with disabilities in contravention of the [CRPD].”<sup>84</sup>

*Definitions in the Disability Discrimination Ordinance (DDO)*

When the DDO was enacted in 1995 it was considered a progressive law and an example of good practice in the region.<sup>85</sup> It prohibits discrimination, harassment, and vilification on the ground of disability and applies to a fairly wide range of activities, including employment, education, housing, the supply of goods and services, and the administration of government programs. The DDO was enacted during the transition period leading to the handover, which presented a unique opportunity for law reform.<sup>86</sup> However, by the time Hong Kong submits its initial report under the CRPD, the DDO will be at least 15 years old. Given the paradigm shift that has occurred in this field in recent years, the DDO is probably ripe for a review.<sup>87</sup>

The definitions section is a good place to start. Section two of the DDO defines “disability” as including:

“total or partial loss of the person’s bodily or mental functions;  
total or partial loss of a part of the person’s body;  
the presence of organisms capable of causing disease or illness;  
the malfunction, malformation or disfigurement of a part of the person’s body;  
a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or  
a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behavior.”

This definition (like much of the DDO) was based on the Australian Disability Discrimination Act 1992, which is broader than some national laws in that it does not require evidence of a substantial or long-term adverse effect. Nonetheless, the definition takes a highly medical approach, one

<sup>84</sup> See Parliament of Australia, Joint Standing Committee on Treaties, Report 95, Ch 2: Convention on the Rights of Persons with Disabilities, para 2.41. Available at: <http://www.aph.gov.au/house/committee/jsct/4june2008/report1.htm> (accessed 18 Nov 2008.).

<sup>85</sup> See generally Petersen, n 21 above.

<sup>86</sup> See Carole J. Petersen, “Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong. (1996) 34 *Columbia Journal of Transnational Law* 334.

<sup>87</sup> In 2004, the Australian Productivity Commission conducted a public inquiry and review of the Australian statute that served as the model for the Hong Kong DDO; the report could provide some guidance and background on issues to be examined in a review of the DDO. See Productivity Commission Report on the Review of the Disability Discrimination Act 1992, released 14 July 2004. Available at: <http://www.pc.gov.au/projects/inquiry/dda/docs/finalreport> (accessed 17 Nov 2008).

that is arguably inconsistent with the social model adopted in the CRPD.<sup>88</sup> Representatives of disability rights groups in Hong Kong have reported that people filing complaints with the Hong Kong EOC are often frustrated by the requirement that they must provide medical evidence of their “disabilities”, even in cases in which it is fairly obvious that the complainant has limited mobility and is requesting improved accessibility.<sup>89</sup>

The drafters of the CRPD also struggled with the question of whether and how to define disability and the seventh session of the Ad Hoc Committee was largely devoted to this issue.<sup>90</sup> Some delegates and non-governmental representatives wanted a fairly specific (yet broad) definition of disability because they feared that national governments would otherwise feel free to exclude people with certain types of disabilities from the protection of national laws. Others argued that any medical definition would undermine the treaty’s commitment to a social approach and would inevitably exclude someone at some point in time.<sup>91</sup> Eventually the drafters agreed on an approach that stays largely committed to the social model. Although there is no definition of “disability” in the definitions section of the treaty, Article 1 states that the purpose of the convention is to: “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities ...” and that “[p]ersons with disabilities *include* those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (emphasis added).” Thus, Article 1 does not define the scope of “persons with disabilities” but does make it clear that certain groups must be protected by a national law implementing the Convention.

To some extent, the Hong Kong DDO also takes a mixed approach in that it defines disability in medical terms but prohibits discrimination not only on the ground of an existing disability, but also on the ground of a past disability, a disability that may exist in future, an imputed disability, or a disability of an associate.<sup>92</sup> This approach is intended to avoid debates on whether the plaintiff currently has a medically recognised “disability” and to concentrate instead upon acts of discrimination. For example, in the

<sup>88</sup> For a discussion of the potential conflicts between this definition and the social model, see *ibid.*, Ch 11.

<sup>89</sup> See Carole J. Petersen, Janice Fong and Gabrielle Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong* (Hong Kong: Centre for Comparative and Public Law, University of Hong Kong, 2003), p 76.

<sup>90</sup> See United Nations Enable, Revisions and Amendments at the Seventh Session of the Ad Hoc Committee (especially the “Chair’s Closing Remarks”). Available at: <http://www.un.org/esa/socdev/enable/rights/ahc7revamend.htm> (accessed 1 Oct 2008).

<sup>91</sup> See Arlene Kanter, n 4 above, pp 291–2.

<sup>92</sup> DDO, s 2 and s 6(c).

landmark case of *K, Y, and W v Secretary for Justice*<sup>93</sup> the EOC obtained a declaration that the government was violating the DDO by maintaining a policy of refusing to hire a person in the five “disciplined services” (police, immigration, customs and excise, fire services, and correctional services) if the applicant had a close relative with mental illness. None of the three plaintiffs had a disability that would have met the definition in s 2 of the DDO (quoted above). Yet the government argued that the plaintiffs could not be trusted to safely perform the jobs they had applied for, because each had a relative with a history of mental illness. The EOC argued that the three cases were examples of discrimination on the ground of an imputed disability (the government was assuming that each plaintiff would likely inherit the same mental illness as his relative) or a case of discrimination on the ground of the disability of an associate (which is the way that the court ultimately analysed the case). Even if the DDO is amended to incorporate a less medical definition of disability, these provisions – which tend to broaden the protection offered by the DDO – should be maintained to address this important aspect of prejudice.

If Hong Kong decides to remove (or revise) the existing definition of “disability” in the DDO then it also should reconsider the definition of “discrimination”, which is currently tied to the definition of “disability”. The DDO uses (in s 6) the classic concepts of “direct” and “indirect” discrimination. Direct discrimination occurs when a person treats another person, on the ground of her disability, less favourably than he would treat a person without a disability. The Hong Kong Court of Appeal has recently clarified that it is not necessary, in cases of direct discrimination, for the plaintiff to prove that the defendant was aware of the disability or that the defendant consciously treated the plaintiff less favourably; unconscious discrimination can also be actionable.<sup>94</sup> It is, however, necessary to identify a suitable “comparator” (real or hypothetical) and then consider how the defendant would have treated that comparator. This approach can be problematic in disability cases, as demonstrated in the Hong Kong case of *Ma Bik Yung v Ko Chuen*.<sup>95</sup> In that case the District Court found that the defendant taxi driver treated the plaintiff very rudely: he tried to avoid serving her, refused

<sup>93</sup> [2000] 3 HKLRD 777. For a commentary on the case see Carole J. Petersen, “The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong”, (2002) 32 HKLJ 103.

<sup>94</sup> *M v Secretary for Justice* (CACV 256/2007, 10 Nov 2008), especially paras 69–70. Available at: <http://legalfref.judiciary.gov.hk/lrs/common/jul/judgment.jsp> (accessed 20 Nov 1008).

<sup>95</sup> *Ma Bik Yung v Ko Chuen* [1999] 1 HKC 714 (District Court); [2000] 1 HKC 745 (Court of Appeal); [2001] 4 HKC 119 (Court of Final Appeal). The appeal to the Court of Final Appeal was limited to the question of whether a court may order an apology as a remedy under the DDO and the Court of Final Appeal held that it may do so but only in rare cases, due to the interference with the defendant’s freedom of expression. A trial court may also consider alternative remedies, such as a substantial increase in damages, if the defendant is vehemently opposed to apologising.

to assist in folding and storing her wheelchair, and verbally harassed her during the taxi ride. The judge's finding of disability harassment was upheld on appeal but the finding of disability discrimination was overturned by the Court of Appeal. The trial judge had defined the hypothetical "comparator" for the discrimination claim as a person without a disability who travels with a piece of heavy luggage. According to the Court of Appeal, this was the correct comparator and the next step in the analysis was for the judge to expressly determine whether the defendant would have treated the comparator more favourably than the plaintiff (a step which the Court of Appeal believed the trial judge failed to take).<sup>96</sup> In my view, the case reveals a fundamental problem with the comparator approach: a person without a disability would not be affected in the same way as a wheelchair user when confronted by an unhelpful taxi driver. The customer without a disability could simply load her own suitcase and still use the taxi. In contrast, the plaintiff in *Ma Bik Yung* could not fold and store her own wheelchair and was compelled to plead with the driver and eventually ask a passing stranger for assistance.<sup>97</sup> Thus, even if the defendant taxi driver did treat everyone "alike" – which seemed doubtful in that particular case in light of the finding of disability harassment – the impact could be highly discriminatory.

If a taxi driver does treat all customers equally badly then one might argue that a complaint by a wheelchair user should be analysed as a case of indirect discrimination, a concept that was designed to address practices and policies that are applied to everyone but have a disproportionately negative impact on some people. But a claim for indirect disability discrimination is almost impossible to win in Hong Kong because it is defined so narrowly; it occurs where:

- “(b) [the defendant] applies to that other person a requirement or condition which he applies or would apply equally to a person without a disability but-
  - (i) which is such that the proportion of persons with a disability who can comply with it is considerably smaller than the proportion of persons without a disability who can comply with it;
  - (ii) which he cannot show to be justifiable irrespective of the disability or absence of the disability of the person to whom it is applied; and

<sup>96</sup> For criticism of the Court of Appeal's judgment on this and other issues, see Carole J. Petersen, "The Failure of the Hong Kong Court of Appeal to Recognize and Remedy Disability Discrimination", (2000) 30 HKLJ 6.

<sup>97</sup> See the trial judge's findings of fact at [1999] 1 HKC 714, 721–22 and 726–27.

- (iii) which is to that person's detriment because he cannot comply with it[.]”<sup>98</sup>

The problem rests with the language “requirement or condition”. While courts in some jurisdictions have interpreted this language fairly broadly, the UK courts (which Hong Kong courts tend to follow) interpreted it narrowly, as requiring evidence of an “absolute bar” to the plaintiff.<sup>99</sup> In theory, this form of discrimination could have been established in *Ma Bik Yung* if the taxi driver had displayed a sign stating: “passengers must lift their own luggage and other items in order to ride in this taxi” – but discriminatory policies normally are not that obvious or that absolute.<sup>100</sup>

Hong Kong's narrow definition of indirect discrimination is problematic in the general field of anti-discrimination law,<sup>101</sup> and there are a number of improvements that could be made to it in the DDO. For example, the language “requirement or condition” could be replaced with broader language, such as “practice or policy.” Alternatively, Hong Kong might consider adopting a more unified definition, one that would not require a plaintiff to classify a claim as “direct” or “indirect” discrimination and would expressly recognise the denial of reasonable accommodation as a form of discrimination. This would be more consistent with the intent of the CRPD, which states, in Article 2:

“Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms[.]”

<sup>98</sup> DDO, s 6. This definition was borrowed from UK statutes on race and sex discrimination, which have since been amended to comply with European Union directives on equal treatment.

<sup>99</sup> For further discussion, see Petersen, Fong, and Rush, n 89 above, p 26.

<sup>100</sup> One good outcome of the case of *Ma Bik Yung* is that the Hong Kong EOC issued a document entitled “Guidelines for Taxi Services” (1998). Available at: <http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Guideline%20for%20Taxi%20Services> (accessed 1 Oct 2008).

<sup>101</sup> For analysis of why Hong Kong should have adopted a broader definition of indirect discrimination in the recent legislation on racial discrimination, see Carole J. Petersen, “Racial Equality and the Law: Creating an Effective Enforcement Model for Hong Kong”, (2004) 34 *HKLJ* 459, 469–71; and Kelley Loper, “One Step Forward, Two Steps Back? The Dilemma of Hong Kong's Draft Race Discrimination Legislation”, (2008) 38 *HKLJ* 15.

At present the concept of reasonable accommodation is not expressly stated in the DDO's definition of discrimination, although it can be relevant in the "unjustifiable hardship" defenses.<sup>102</sup> Defining unlawful discrimination as including the denial of reasonable accommodation would be a powerful – and practical – way of embracing the social model of disability rights.

*Strengthening the enforcement model for the DDO*

Article 33 of the CRPD obligates States Parties to establish institutions to monitor and implement the treaty domestically. Article 33(2) describes the need for one or more "independent mechanisms" which should operate consistently with the Paris Principles for the protection and promotion of human rights. With respect to claims arising under the DDO, the Hong Kong EOC provides important investigation, conciliation and sometimes litigation services. But the EOC is not a general human rights commission and thus cannot assist with complaints that do not arise under the specific anti-discrimination ordinances that it is empowered to enforce. Moreover, the executive branch currently exercises the power to appoint members of the EOC, including the Chairperson. There is a risk that the government may appoint overly conservative members, especially as the EOC regularly processes complaints relating to government departments and has successfully litigated some controversial cases against the government.<sup>103</sup> The Hong Kong government must be careful to adhere to the Paris Principles which require that the EOC enjoy absolute independence from government, has a pluralistic membership, and represents organisations in civil society that are actively involved in the protection and promotion of human rights.

The statutory enforcement model, which obligates the EOC to encourage conciliation, also needs to be reviewed. In 2003 my colleagues and I completed a study, in which we extracted information from a database of 451 complaints that had been processed by the EOC (including 245 filed

<sup>102</sup> For example, the DDO provides, in s 12, an exemption where an employer can demonstrate that the absence of disability is a genuine occupational qualification, where the person is unable to carry out the inherent requirements of the job, or where the person could only perform the job with accommodations that place "an unjustifiable hardship" on the employer. Similar "unjustifiable hardship" defenses are included for providers of education, premises, goods and services. The Disability Discrimination Ordinance Code of Practice on Employment lists, as examples of reasonable accommodations, modifications to work premises, changes to job design, and the provision or modification of equipment. In *M v Secretary for Justice* (n 93 above), the Court of Appeal noted (at paras 83–91) that the employer is not required to alter the nature of the job or to employ an extra employee to do work originally assigned to the plaintiff.

<sup>103</sup> For further discussion of the EOC's litigation against the government and possible threats to its independence, see Petersen, n 33 and n 93 above.



under the DDO).<sup>104</sup> We also conducted interviews with EOC officers, past complainants, representatives of respondents, and representatives of interested non-governmental organisations. One of the chief concerns expressed by disability rights groups was the lack of litigation. The vast majority of complaints are resolved through the EOC complaints resolution process and are thus not in the public domain. Although many individuals prefer to obtain remedies in a confidential process, the use of conciliation tends to limit the systemic impact of the law.

Another problem with the existing model is that the complainant does not know whether she will receive legal assistance when she enters an EOC conciliation conference because she cannot apply for legal assistance until her complaint is deemed “unsuccessfully conciliated”. This can significantly weaken the bargaining power of the complainant, exacerbating the power imbalance that often characterises discrimination cases. The complainant may be tempted to accept a very low offer because she will not want to risk leaving the conciliation process empty-handed. In contrast, the respondent has little motivation to cooperate, because he knows that the EOC does not grant legal assistance very often and that there will be, in any event, further opportunities to settle the case if the complainant does manage to obtain legal representation. Interestingly, our study revealed that only a small proportion of conciliated complaints lead to a monetary remedy: out of 158 conciliated complaints in our sample (filed under three different anti-discrimination ordinances), monetary compensation was requested in 47 cases but received in only 35 cases (22 per cent).<sup>105</sup> More than half of the complainants who requested monetary compensation and went through the conciliation process either did not receive any settlement at all or had to give up their request for financial compensation in order to achieve a conciliated outcome. These results are consistent with our theory that complainants (who have no idea whether they will receive legal assistance from the EOC and thus cannot credibly threaten the respondent with a lawsuit) generally have less bargaining power in conciliation conferences than respondents.

In theory, a complainant can avoid the EOC process altogether and file her DDO complaint directly in the District Court. However, in practice, this rarely occurs because Hong Kong lawyers are expensive and not permitted to work on a conditional or contingency fee basis. Thus, most complainants turn first to the EOC, which currently has a statutory obligation to attempt

<sup>104</sup> Names and other identifying information were removed from the data base; for the methodology of the study see Petersen, Fong, and Rush, n 89 above, pp 4–5. See also DDO s 62 (for an example of how the current statutory framework obligates the EOC to attempt conciliation).

<sup>105</sup> See *Ibid.* (Petersen, Fong, and Rush), p 39.

to conciliate a complaint before granting assistance to litigate. It is, therefore, not surprising that only a small number of EOC-sponsored cases have reached the courts.

The legislature could partly address this problem by amending the legislation to clarify that the Hong Kong EOC is not obligated to attempt to conciliate a case before granting legal assistance. Assuming that the EOC has an adequate litigation budget, it could then adopt a general policy of granting legal assistance to all meritorious cases that do not conciliate. While many complainants would still prefer a conciliated outcome (to preserve their privacy and avoid the stress of litigation), those that are willing to litigate would be less likely to settle for an inadequate remedy – because they would not have to worry that they may not be able to sue due to lack of legal assistance. Of course, a large percentage of cases would still settle before trial, but the remedies would probably be more substantial; those that go to trial would help to develop the law and increase public awareness.

For example, the case of *K, Y, and W v Secretary for Justice* (discussed above) attracted a great deal of attention and revealed a shocking lack of awareness in the government regarding the “inheritability” of mental illness. The government attempted to argue that the plaintiffs could not perform their jobs “safely” simply because of their relatives’ medical history. The court correctly rejected this defense, noting that the government had never even attempted to evaluate whether the three plaintiffs had a significantly greater risk than the general population of developing mental illness. This is precisely the kind of stereotyping that needs to be publicly discussed and condemned.

Another good example of the educative value of litigation is the case of *Siu Kai Yuen v Maria College*,<sup>106</sup> in which a teacher was fired after he was diagnosed with cancer. The school claimed that it had the right to dismiss him because absence from more than 10 per cent of his classes was a “fundamental breach” of his contract, regardless of the reason for the absence. The judge held that reliance on a contract is not a defense to a claim of disability discrimination and that the contract’s provisions regarding absence were void under the DDO, as the law prohibits discriminatory practices in contractual terms. Apparently, the defendant (and its lawyers) believed that it could rely entirely upon the employment contract and that the DDO would have no effect upon the contract’s validity. The EOC granted legal assistance in this case in the hope that the court’s decision would educate the public and “serve as a guideline for employers

<sup>106</sup> [2005] 2 HKLRD 775.

on the management of sick leave in the workplace.”<sup>107</sup> Yet it is clear, from subsequent press releases and the EOC’s annual reports that employers continue to unlawfully dismiss employees because of an illness or injury. The EOC regularly conducts training and educational programs and has also granted legal assistance to some additional cases alleging disability discrimination in employment.<sup>108</sup> But employers almost certainly know that the chances of being sued in court under the current enforcement model are still very low and that it is, therefore, relatively safe to disregard the law. In any event, given the small number of judgments in the past 12 years, it seems that there is considerable room to expand the number of cases that are taken to court.

If the EOC cannot expand its legal assistance program (and if the government is not willing to support equal opportunities cases through other forms of legal aid) then Hong Kong should consider establishing an inexpensive “equal opportunities tribunal”, an idea that was generally supported by the disability groups we interviewed.<sup>109</sup> A tribunal could be especially effective in the area of accessibility, allowing complainants and disability rights groups to draw attention to the daily struggle that many people experience trying to navigate Hong Kong’s inaccessible buildings and neighborhoods.

The EOC could also make more use of its formal investigation powers, pursuant to ss 66-70 of the DDO.<sup>110</sup> Although it has frequently published research reports and informal “investigation reports” on disability-related issues,<sup>111</sup> the EOC has completed only one formal investigation, which was on sex discrimination in admissions to secondary schools.<sup>112</sup> This may be partly due to the statutory procedures, which were borrowed from

<sup>107</sup> See EOC press release: “EOC gives legal assistance in disability discrimination cases”, 3 June 2004. Available at: <http://www.eoc.org.hk/EOC/GraphicsFolder/ShowContent.aspx?ItemID=2561> (accessed 1 Oct 2008). See also the Disability Discrimination Ordinance (DDO) Code of Practice on Employment (1996) (drafted by the EOC but approved by the Hong Kong Legislative Council subsidiary legislation under Cap. 487, Laws of Hong Kong).

<sup>108</sup> See for example, the EOC press release of 17 Sep 2008, announcing legal assistance on behalf of a man who was dismissed from his job after suffering a stroke. Available at: <http://www.eoc.org.hk/EOC/GraphicsFolder/ShowContent.aspx?ItemID=7814> (accessed 15 Nov 2008).

<sup>109</sup> See Petersen, Fong, and Rush, n 89 above, p 88.

<sup>110</sup> See Byrnes, n 29 above, who has also commented on the value of formal investigations and inquiries, noting that commissions in the United Kingdom and Australia appear to have made good use of these mechanisms, particularly to address systemic discrimination.

<sup>111</sup> See for example, the EOC’s *Report on Case Study of Kowloon Bay Health Centre* (1999), which reported on severe incidents of disability discrimination and harassment against patients and caregivers. Available at: <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/investigation/list.aspx?itemid=1208&investigationname=2> (accessed 20 Oct 2008).

<sup>112</sup> The formal investigation, conducted under the Sex Discrimination Ordinance, eventually led to a successful action for judicial review of the government’s admission policies, in *EOC v Director of Education* [2001] 2 HKLRD 690. For commentary on the case, see Petersen, n 93 above.

unduly complex and cumbersome UK legislation.<sup>113</sup> The EOC is, however, hopefully close to completing its first formal investigation under the DDO – a long-awaited investigation on accessibility that was launched in December 2006.<sup>114</sup> The investigation has focused on housing estates, commercial centres, car parks, buildings, and offices that are built, owned or managed by the Housing Authority, Housing Society, the Link Management Ltd, or the Hong Kong government. This is not because the legal duty to provide accessible premises is limited to public premises. (Private owners and property managers also have a duty not to discriminate against persons with disabilities although they often assert, as a defense, the argument that the requested changes to the building would impose an unjustifiable hardship.<sup>115</sup>) The EOC determined, however, that publicly accessible premises have a higher concentration of persons with disabilities and thus decided to focus the investigation on these premises.<sup>116</sup> The topic of accessibility will also be explored in the next section, as it necessarily involves executive policies.

*The need for a central body to coordinate executive policies on disability*

The EOC's jurisdiction is limited by the DDO, which prohibits discrimination in certain defined areas. However, the CRPD is broader in scope than the DDO and necessarily touches on many different laws and government policies. When the Chairperson of the EOC was asked to provide his views on the ratification of CRPD, he correctly pointed out that the treaty would affect not only the EOC's activities but also the obligations of the local government. He also noted that Hong Kong currently has no coordinating body for executive policies relating to disability.<sup>117</sup>

Article 33(1) of the CRPD obligates States Parties to “designate one or more focal points within government for matters relating to the implementation” of the CRPD and to “give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.” The drafters included this provision because many of the laws and policies that need to be reviewed for compliance with the CRPD require

<sup>113</sup> See George Applebey and Evelyn Ellis, “Formal Investigations: the Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies”, (1984) *Public Law* 236.

<sup>114</sup> See EOC Press Release “EOC Conducts Formal Investigation on Accessibility”, 12 Dec 2006. Available at: <http://www.eoc.org.hk/eoc/GraphicsFolder/ShowContent.aspx?ItemID=7053> (accessed 20 Oct 2008).

<sup>115</sup> See DDO, s 25(2)(b) and s 4 (setting forth factors to be considered by the judge in determining what constitutes “unjustifiable hardship”, including the reasonableness of the requested changes, the financial resources of the defendant, and the likely benefit to the plaintiff and other persons).

<sup>116</sup> See n 114 above, quoting Raymond Tang, Chairperson of the EOC.

<sup>117</sup> See Tang, n 71 above.

coordination among different departments and the establishment of funding priorities. The treaty recognises (in Article 4) that economic, social and cultural rights require resources and that public funds are not unlimited. But this does not mean that governments do not have an obligation to make progress; rather, governments must identify the gaps between current practice and the rights that have been recognised in the treaty and the steps that they propose to take. This section of the article thus discusses a few of the pressing issues that might be addressed by a central body on disability.

Accessibility is one of the key “themes” in the CRPD<sup>118</sup> and one of the most visible ways in which a government can demonstrate its commitment. The Committee on the Rights of Persons with Disabilities will carefully study the reports of States Parties (and also of non-governmental organisations), to determine whether the right to an accessible environment is being realised. While Hong Kong has made some progress in this area, it remains a largely inaccessible place. To cite just one example, during the 2004 Legislative Council elections, only 287 out of 501 polling stations were accessible to voters with mobility impairments.<sup>119</sup> Voters who were allocated to the inaccessible stations could only vote if they notified the Registration and Electoral Office five days in advance so that they could be relocated to an accessible polling station. This arguably infringed the right to participate in political and public life, which is protected by the Bill of Rights Ordinance (Article 21 of s 8) and the ICCPR (Article 25). In addition, Article 29 of the CRPD now expressly provides that persons with disabilities shall enjoy political rights on an equal basis with others and that voting procedures, facilities and materials should be accessible.

Hong Kong’s mass transit system (known as the MTR) arguably deserves the “most improved” award in the area of accessibility, partly because so many new lines have been added and the newer stations are generally accessible.<sup>120</sup> Nonetheless, according to the most recent MTR brochure, close to 1/3 (16 out of 50) of the MTR stations still lack step-free independent access from the street to the concourse; seven of these stations also lack step free access from the concourse to the platform.<sup>121</sup> In the inaccessible stations a person

<sup>118</sup> See MacKay, n 12 above. See also the CRPD, Art 9, on Accessibility.

<sup>119</sup> See Submission of the Equal Opportunities Commission on the Second Report of the Hong Kong Special Administrative Region in Light of the International Covenant on Civil and Political Rights (1 Mar 2006; presented to the Hong Kong Legislative Council, Panel on Home Affairs, on 10 Mar 2006), paras 6–8. Available at: <http://www.eoc.org.hk/eoc/graphics/folder/inforcenter/papers/cedawcontent.aspx?itemid=7560> (accessed 15 Oct 2008).

<sup>120</sup> Hong Kong Government Transport Department, *A Guide to Public Transport for People with Disabilities* (2005), Foreword. Available at: [http://www.td.gov.hk/mini\\_site/people\\_with\\_disabilities/foreword.html](http://www.td.gov.hk/mini_site/people_with_disabilities/foreword.html) (accessed 1 Oct 2008).

<sup>121</sup> *Ibid*, Chapter 2: Existing Public Transport Facilities. Available at: [http://www.td.gov.hk/mini\\_site/people\\_with\\_disabilities/mtr.html](http://www.td.gov.hk/mini_site/people_with_disabilities/mtr.html) (accessed 1 Oct 2008).

who cannot climb stairs must contact the Station Controller, “preferably in advance”, to arrange for staff assistance to gain access to the train.<sup>122</sup>

But the larger problem is that when a person with impaired mobility leaves the MTR she has no idea whether she will be able to proceed to her destination because the pedestrian pavements are generally uneven, exceedingly narrow, and/or intermittently blocked by construction, debris, or an illegally parked vehicle. For those of us who can climb stairs, the elevated walkways often provide a more comfortable way to navigate these streets. But elevated walkways are frequently inaccessible to wheelchair users – if there is a lift then it requires some careful sleuthing to locate it. The goals of Article 9 of the CRPD are to enable a person with a disability to live independently and participate in all aspects of society. In many countries, a power-operated wheelchair provides significant independence and mobility. In contrast, in Hong Kong, wheelchair users are discouraged from using power-operated chairs because of the many unpredictable hurdles on the pavements – they need a manual chair and a strong personal assistant who can hopefully help to get around the barriers. As one visitor wrote in 2002, six years after the DDO went into force:

“Hong Kong is singularly the worst city I have visited from a wheelie [wheelchair] point of view. The streets are narrow, with steep hills and difficult curbs. Some streets are so steep that the pavements turn into stairs. The streets are very busy and many can only be crossed by elevated walkways, which are only accessible by steps. Many of the shops have a curious device at their entrance, whereby you go up two steps onto a ledge, before descending two steps into the shop. I presume this is for flood water or something – only the very paranoid would think it was a deliberate anti-wheelchair device.”<sup>123</sup>

Of course, a visitor would have little incentive to file a complaint under the DDO. He may decide that his best “remedy” is just to stay away and warn other wheelchair users of the dangers that Hong Kong presents. Many people who live in Hong Kong do file accessibility complaints with the EOC<sup>124</sup> but their complaints must fall within one of the areas covered by the DDO (such as employment, education, or the provision of goods, services, and facilities) and it may be difficult to identify who should be the “defendant”

<sup>122</sup> *Ibid.*

<sup>123</sup> Diarmuid Corry, “Hong Kong and Macau” (2001–2002). Available on the website of Global Access News: <http://www.globalaccessnews.com/hongkongmacau.htm> (accessed 1 Oct 2008).

<sup>124</sup> The EOC’s 2006–2007 annual report states that accessibility-related complaints make up about 13 per cent of total complaints filed under the DDO. In our study, improvement in physical access to premises and better mobility within premises was requested in 22 (18 per cent) of the 121 disability cases that proceeded to conciliation and ultimately received in 17 cases (14 per cent).

for the generally inaccessible environment that characterises so much of Hong Kong. Defendants also often raise the “unjustifiable hardship” defense to resist making changes to buildings and other premises. Interestingly, in our study of the EOC’s complaints process, we found that respondents to accessibility complaints were often public sector institutions, such as the Housing Department. One would think that a government department could address straightforward complaints regarding wheelchair access through a pro-accessibility policy, without requiring the EOC to devote resources to investigation and conciliation. In some cases, the Housing Department ultimately re-housed the complainant in order to avoid or delay making alterations to a building. While this type of remedy improves the situation for the individual complainant, it does not reduce the barriers in the building itself.

The simple truth is that individual complaints filed under the DDO will not, by themselves, bring about much systemic change to Hong Kong’s inaccessible environment. Hopefully the results of the EOC’s formal investigation (which should be available by the end of 2008) will accomplish more. But there is still an urgent need for a more coordinated executive policy on accessibility, one that will be backed up by regular inspections and enforcement. There may also be a need for government-subsidised alterations where individuals and companies lack the resources to comply with the CRPD.

Who should conduct the research to develop that policy on accessibility? There is no obvious government department because accessibility touches on so many areas of life – not only buildings but also transportation, communications, signage, and emergency services. At present, policies are established by different government departments and it is unlikely that they all have the appropriate training to comply with the treaty. For example, while the Constitutional and Mainland Affairs Bureau has general responsibility for matters relating to human rights, the Food and Health Bureau addresses healthcare issues (including regulations issued under the recently enacted Prevention and Control of Disease Ordinance, discussed above). Issues relating to rehabilitation fall under the Labour and Welfare Bureau and are informed, to some extent, by a Rehabilitation Advisory Committee (RAC).

Policies on education and training for people with disabilities must also be examined as Hong Kong now has the duty not only to encourage, but rather to provide, an inclusive education for persons with disabilities. Article 24 of the CRPD directs States Parties to “ensure an inclusive education at all levels” so as to enable persons with disabilities to reach their fullest potential and participate in society. Thus far, the Hong Kong Education Department has encouraged schools to participate in pilot projects that

integrate students with disabilities through the “whole school” approach. In 2005 it was reported that 80 primary schools and 37 secondary schools had participated in this project, with financial and other support from the government.<sup>125</sup> This policy, no doubt, also received some support from the enactment of the DDO in 1995 and the adoption of the Disability Discrimination Ordinance Code of Practice on Education in 2001, which makes it clear that schools have a duty to provide reasonable accommodations to students with disabilities if they apply.<sup>126</sup> Nonetheless, there has been resistance to the inclusive education movement in Hong Kong and stakeholders have struggled to achieve a consensus.<sup>127</sup> Educationalists could benefit from the opportunity to contribute to (and learn from) a central body that examines the concept of inclusive education from a human rights perspective.

Research conducted by the EOC and two local universities concluded that mental health services in Hong Kong have also been fragmented and could be better coordinated under a multidisciplinary body. While the EOC suggested a Mental Health Council, this issue might also be addressed by a central coordinating body on general disability rights and policy.<sup>128</sup> Although the EOC receives numerous complaints of discrimination from people with mental illness, its jurisdiction and expertise is limited to enforcing the DDO and it cannot address all of the issues raised in its research on mental illness, many of which necessarily involve the provision of health services or legislation beyond the DDO. For example, the Mental Health Ordinance<sup>129</sup> governs the question of when compulsory treatment orders or orders for involuntary admissions to hospitals can be issued. These matters must be reviewed in preparation for Hong Kong’s initial report under the CRPD, which protects the liberty and security (Article 14) of persons with disabilities and also the right not to be subjected to cruel, inhuman or degrading treatment (Article 15).

The issues discussed in this article are only the tip of a very large iceberg that is floating just beneath the surface of the CRPD and its application to Hong Kong. Given the breadth and depth of this treaty, we can expect ad-

<sup>125</sup> Ming-Gon John Lian, “Backgrounds and efforts in Enhancing Education in Hong Kong, Taiwan, and the United States”, *Conference Proceedings: Innovations in Inclusive School Development* (Hong Kong: Centre for Special Needs and Studies in Inclusive Education, Hong Kong Institute of Education, December 2005). Available on <http://www.ied.edu.hk/csnsie/proceedings2005.htm> (accessed 20 Oct 2008).

<sup>126</sup> The Disability Discrimination Ordinance Code of Practice on Education is available at: [http://www.eoc.org.hk/eoc/otherproject/eng/color/youthcorner/education/cop\\_edu/cop\\_edu\\_b.htm](http://www.eoc.org.hk/eoc/otherproject/eng/color/youthcorner/education/cop_edu/cop_edu_b.htm) (accessed 10 Oct 2008).

<sup>127</sup> See Lian, n 125 above, especially pp 96–7.

<sup>128</sup> See Hong Kong EOC, *A Study of Mental Health Service Users’ Perception and Experience of Discrimination in Hong Kong* (Nov 2002). Available at: <http://www.eoc.org.hk/eoc/graphics/folder/inforcenter/research/content.aspx?itemid=5275> (accessed 20 Oct 2008).

<sup>129</sup> Cap. 136, Laws of Hong Kong.



ditional issues to be raised as advocates rely upon the CRPD in litigation and policy debates.<sup>130</sup> If the government simply assigns the responsibility to write its initial report to the same people who have drafted previous reports to treaty monitoring bodies then the exercise will fall short of its potential – not because those people are not talented but because they will lack the information, resources, and perspective to fully analyse the challenges facing people with disabilities in Hong Kong. Instead, a multi-disciplinary body with significant representation from disability groups, professionals, and civil society should be engaged. Such a body could hopefully take a fresh look at the many laws and policies affected by the treaty and recommend reforms that are needed to implement it. Regardless of who drafts it, Hong Kong's initial report under the CRPD will almost certainly be very long and have many ordinances attached to it. The question is whether that initial report will reflect the paradigm shift that the CRPD is supposed to require.

<sup>130</sup> In *M v Secretary for Justice*, n 94 above, the plaintiff's lawyer argued that the DDO should be interpreted so as to comply with the CRPD. While the Court of Appeal said little on this point, it observed that the CRPD was not in force when the plaintiff's claim arose and also referred to the CRPD and other international instruments as "statements of aspiration" (para 57). It should be noted that the CRPD is legally binding on the Hong Kong government. Although the DDO was enacted before the CRPD was created, the Hong Kong government will almost certainly rely heavily upon the DDO in its initial report and argue that the DDO is one of its chief means of implementing the CRPD. Therefore, there is a strong argument in favor of interpreting any ambiguous provisions in the DDO in a manner that complies with Hong Kong's obligations under the DDO.

